No. 82-1571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST ALABAMA BANK OF MONTGOMERY, N. A.,
Petitioner,

vs.

CHARLOTTE KYLE MARTIN, KATHLEEN GERSON, GLORIA MCKEON, and VIRGINIA G. WELDON,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Alabama

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

Petitioner (herein called "Bank") made imprudent investments of Common Trust Funds under its control, resulting in a substantial loss of both principal and income. Plaintiffs filed class action, seeking declaratory judgment as to liability and restoration by trustee of the loss. There was one ultimate issue: Who should bear the loss, the trustee who breached the trust or the innocent beneficiaries? The Alabama Courts required the trustee to restore the fund lost by the breach of trust. No issue is here raised as to the justice or finality of that determination, but Petition seeks to raise three constitutional questions:

1. In a class action under Rule 23(b)(1) and 23(b)(2), does the Defendant-trustee have a constitutional right to avoid judicial accountability unless and until Plaintiffs bear the expense of personal notice to everyone who will participate in the restoration of funds lost through imprudent investments?

2. Does the Defendant-Bank have the constitutional right, by late-filed counterclaim, to impede the orderly determination of the class action?

3. Does the Constitution or any Federal Statute grant to a national bank, acting as paid trustee, a right to have its responsibility adjudged by a standard different from that applicable to all other paid trustees?[1]

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[1] Petition makes no claim that this issue was raised in the Alabama Courts.

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BRIEF FOR THE RESPONDENTS

Respondents, on behalf of themselves individually and all unnamed members of the two classes involved, respectfully oppose the Writ of Certiorari.

OPINIONS BELOW

On July 26, 1979, the Trial Court made a class action determination and entered an order, which appears as Appendix G to the Petition. Petitioner took an interlocutory appeal to the Supreme Court of Alabama, which rendered a decision reported at 381 So. 2d 32.[1]

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[1] Petition, Appendix D.

Following this decision, Petitioner filed a late-filed counterclaim, requesting that the Court, in the class action proceeding, hear separate accountings of each of 1,250 individual trusts handled by the Bank in a different capacity. By Order of June 3, 1980, this counterclaim was dismissed without prejudice to the Bank's right to have separate accountings. R. 328. Copy of this Order is attached as Appendix A hereto.

Following trial on the merits, the Trial Judge entered an Order determining breach of trust.[2] On August 19, 1981, Final Decree was rendered declaring the breach of duty and ordering the Bank to put the Common Trust Funds in the same position they would have occupied if the trustee had fully and faithfully performed its duty.[3]

Appeal was duly taken from this Final Decree to the Supreme Court of Alabama. On August 20, 1982 the Supreme Court of Alabama entered its original Order, affirming the finding of the Court Below except as to the calculation of interest. On January 14, 1983, that Court granted Respondents' Application for Rehearing and affirmed in toto the Final Decree of the Circuit Court. This Opinion is reported in 425 So. 2d 415.[4]

JURISDICTION

No issue is raised as to the timely filing of Petition for Certiorari. Issue does arise as to whether this Court's jurisdiction was properly invoked under 28 USC §1257(3), and whether the Petitioner timely and properly specially set up or claimed any right, title, privilege, or immunity under the Constitution or Statutes of the United States.

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[2] Petition, Appendix F.

[3] Petition, Appendix E.

[4] Appendix A and B to Petition, pp. A-1 to A-31.

STATUTORY AND CONSITUTIONAL PROVISIONS

We do not disagree with the statements in the Petition.

STATEMENT OF THE CASE

At this first opportunity, we challenge the correctness of the three factual statements upon which the Petition is based.

I. That "Bank raised before the Trial Court in pleadings", as well as in brief and argument, "the question presented for review here".[5]

II. That this action sought "predominantly enormous money damages".[6]

III. That the judgment below "deprived Bank of its well established and constitutional right to insist upon an accounting".[7]

I

At no time in the pleadings, answer, or numerous motions did the Defendant-Bank raise the question sought to be reviewed here, the right to require notice to all class members. The lengthy record reflects only three references to this issue of notice to the beneficiaries. We are appending those three extracts as Appendix B.[8] While the Bank argued that the class

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[5] Petition, p. 3 (Footnote).

[6] Petition, p. 3 (Footnote), 6, 8, 12, 15, 17.

[7] Petition, p. 17.

[8] Oral argument on class action determination, Appendix B-1; brief on interlocutory appeal, Appendix B-2; brief on appeal from final judgment, Appendix B-3.

Plaintiffs had a constitutional right to notice, at no time did the Bank claim that the Bank had a constitutional right to require such notice before declaratory judgment could be rendered, determining its breach of trust.

II

The factual statement that this action sought money damages was made before the Supreme Court of Alabama and rejected by that Court.[9] This decision was fully sustained by the pleadings and by the orders of the Court Below. Appended hereto as Appendix C is a copy of the Prayer For Relief in the Amended Complaint. Both this Prayer and the relief granted by the Court Below show that the only relief sought and granted was a declaration of breach of duty by the trustee and restitution to the Common Fund of the losses caused by the breach of trust.

On rehearing, the Supreme Court of Alabama specifically held that the judgment in this case was not a judgment for money as debt or damages.[10]

III

Petitioner states as a fact that the judgment below deprived Bank of its constitutionally right to insist upon an accounting. The Order of June 3, 1980, appended hereto as Appendix A, specifically reserved to the Bank the right to accounting of individual trusts in separate proceedings. In the exercise of its discretion under Rule 13 and Rule 23, of the Alabama Rules of Civil Procedure, the Circuit Court merely refused to permit the

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[9] Opinion, 425 so. 2d at 423; HN 2; Petition, p. A-14.

[10] Opinion, 425 So. 2d 430; Petition, p. A-31

Bank to impede the orderly hearing of the class action proceedings. This application of the Alabama Rules of Civil Procedure was upheld by the Supreme Court of Alabama.[11]

In view of the inaccuracies in the "Statement of the Case" in the Petition, we believe it would be helpful to the Court if we completely restated the same.

Each of the Plaintiffs was the beneficiary of an individual trust, of which Petitioner-Bank was trustee. The Bank received an annual fee from each of some 1,250 individual trusts.

With approval of the Comptroller of the Currency, the Bank established two Common Trust Funds, a Bond Fund and an Equity Fund. Under the Common Trust Fund Plan, the Bank issued participating units representing proportional rights in the Common Trust Fund. Only an individual trust of which Bank was trustee, could acquire or hold such participating units.

The Plan required a quarterly valuation of the principal and quarterly distribution of income. The value of each participating unit was determined by dividing the total value of the trust fund by the number of participating units outstanding. The value of the holdings of each participating trust was determined by multiplying the unit value by the number of units held.[12] Under this Plan, no Plaintiff held any right other than such as was common to all equitable holders of participating units. No beneficiary had a right to seek or recover monetary damages other than as a proportionate part of the Common Trust Fund.

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[11] Petition, Appendix A, p. A-15 to A-16.

[12] Section 5.2 of the Common Trust Plan specifically provided: (1) . . . Each Fund shall at all times be divided into units of equal value and the proportionate interest of each participating trust shall be expressed by the number of units allocated to such trusts."

As trustee of the Common Bond Fund and trustee of the Common Equity Fund, the Bank made imprudent investments, as a result of which each of the two Common Trust Funds suffered a substantial loss of both principal and income. Two of the named Plaintiffs sought relief from the Bank. The Bank denied any liability to account for all or any of said losses, taking the position generally applicable to all beneficiaries that:

(a) The only right of the beneficiaries was to question the prudence of investments by the individual trusts in the units of the Common Trust Funds, not investments by the Common Fund.

(b) Since the Bank, as trustee of the individual funds, held the legal title to the participating units, no one else had standing to question the prudence of investments made by the Bank as trustee of the Common Trust Funds.

(c) The Bank was only a constructive trustee and, therefore, entitled to the protection of the Statute of Limitations, which was not available to the trustee of express trusts.

Rather than accept this position and bear the losses, the named Plaintiffs brought this action to determine the liability of the Bank and to require the restoration of the losses. To avoid any claim of lack of necessary parties, the action was brought on behalf of all persons holding an equitable interest in the participating units of the Common Funds.[1] While the original Complaint sought a money judgment in favor of the Common Trust Funds, after discovery and before hearing on class action certification, the Third Cause of Action seeking money judgment was dismissed and the first two Causes of Action amended, so as to drop any claim for class action determination under Rule 23(b)(3).

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[1] 90 CJS, p. 706: "Ordinarily all parties whose interests are involved in the issue and who must be necessarily affected by the decree, are necessary parties to a suit for an accounting . . ."

The Circuit Court then held a hearing and took evidence to determine whether the action should be certified as a class action, and, if so, under what section. By Order[14] the Court determined that the action should proceed as a class action under Rule 23(b)(1)(A), 23(b)(1)(B), and/or 23(b)(2), Alabama Rules of Civil Procedure.[15] A separate class was certified as to each of the two Common Trust Funds.

Bank attempted to appeal to the Supreme Court of Alabama from this certification order. By Opinion[16] the Supreme Court of Alabama dismissed the appeal, stating:

> "The lower court's rather lengthy certification order in this case clearly discloses that each of the factors set forth in Rule 23 was carefully considered before the class action determination was made. The order does not reveal any abuse of discretion."

Bank had raised the issue that the class action would be unmanageable. Following remand from the Supreme Court, the Bank sought to make the class action unmanageable by filing a late-filed counterclaim, copy of which is appended hereto as Appendix D. The Bank, sued as trustee of the Common Trust Funds, sought separate accountings of its activities in a separate capacity, i.e., as trustee of 1,250 individual trusts. By Paragraph 5, Bank specially raised the issue that a denial of the right to accounting would violate the Fourteenth Amendment to the Constitution of the United States. No issue was raised in the pleadings that the Bank had a consitutional right to have such accountings heard as a counterclaim in the class action. Con-

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[14] Petition, Appendix G, p. A-59 to A-65.

[15] Identical with Rule 23 of the Federal Rules of Civil Procedure.

[16] 381 So. 2d 32; Petition, Appendix D, p. A-35 to A-42.

trary to what is stated in the Petition, the Alabama Court not only did not deny the right to an accounting of the individual trusts, but by the Order attached hereto as Appendix A, the Circuit Court specifically protected the right of the Bank to separate accountings of the separate individual trusts in proceedings other than the class action. This action was approved by the Supreme Court as a proper exercise of discretion, under both Rule 13(f) and Rule 23(c)(4) of the Alabama Rules of Civil Procedure.[17]

The Petition's third statement of issues presented is:

> "3. Is the judgment below impermissible state judicial interference with a national bank?"

Petitioner cites no ruling by the Alabama Court which it claims violates any federally guaranteed right on this third issue. No such issue was raised in the Bank's pleadings or by any request for any specific ruling by the Alabama Court.

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[17] Opinion, 425 So. 2d 415, at 424, HN 5; Petition, p. A-15 to A-16.

SUMMARY OF THE ARGUMENT

I

No Question Of Federal Right Was Properly Raised In The Court Below And Decided Adversely To The Petitioner.

II

Petitioner Did Not Question The Constitutionality Of Rule 23, Alabama Rules Of Civil Procedure, Particularly Rule 23(c)(2), Requiring Notice Only If The Class Is Certified Under Rule 23(b)(3).

III

The Factual Determination As To Whether The Class Should Be Certified Under Rule 23(b)(1)(A), 23(b)(1)(B), Or 23(B)(2) Was Properly Within The Discretion Of The Trial Court And Its Decision Of Disputed Issues Does Not Constitute A Denial Of Constitutional Right Of The Petitioner.

IV

The Decision Of The Supreme Court Of Alabama Does Not Conflict With The Decision Of This Court In *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, Or *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156.

V

The Decision Of The Supreme Court Of Alabama Does Not Conflict With The Decision Of The Fifth Circuit Court Of Appeals In *Johnson* v. *General Motors Corporation*, 598 F. 2d 432, 438, Or *Penson* v. *Terminal Transport Company*, 634 F. 2d 989, 994.

VI

The Decision Of The Supreme Court Of Alabama Does Not Decide A Constitutional Question In Conflict With Decisions Of Other State Courts Of Last Resort.

VII

The Decision Of The Court Below That The Bank Should Be Required To Seek An Accounting Of Its Acts As Trustee Of The 1,250 Trusts, In Proceedings Separate From The Class Action, Did Not Deprive Bank Of Any Constitutionally Protected Right.

VIII

No Issue Was Raised In The Alabama Court That It Was Unconsitutional To Adjudge The Liability Of A National Bank For Breach Of Duty By Any Standards Other Than Those Applicable To All Paid Trustees.

IX

Petition For Certiorari Based Upon Mis-statements Of Material Facts Should Be Discouraged And This Case Is A Proper Case For Imposition Of Sanctions Under Rule 49(2) Of This Court.

PROPOSITION I

No Question Of Federal Right Was Properly Raised In The Court Below And Decided Adversely To The Petitioner.

No attempt is made by the Petition to comply with Rule 21(h) of this Court's Rules. The Petition has no quotations or specific references to pages of the Record where Federal questions were raised. At no time in pleadings, by motion or otherwise, did the Petitioner attack the constitutionality of Alabama's class action procedure, identical with Rule 23 of the Federal Rules of Civil Procedure. At no time did the Bank ask for any specific ruling upon any specific Federal question, and the Record reflects no such ruling.

While the statement was made in argument and brief that under Rule 23(b)(3), class Plaintiffs are entitled to notice, neither in brief nor in argument did Petitioner raise specific question as to the constitutional right of the Defendant to require such notice if the class is certified under Rule 23(b)(1) or 23(b)(2). The only right mentioned by the Bank in argument was a right alleged to belong to the unnamed class members, not a constitutional right of the Defendant-Bank.

PROPOSITION II

Petitioner Did Not Question The Constitutionality Of Rule 23, Alabama Rules Of Civil Procedure, Particularly Rule 23(c)(2), Requiring Notice Only If The Class Is Certified Under Rule 23(b)(3).

Rule 23 of the Alabama Rules of Civil Procedure is identical with Rule 23 of the Federal Rules of Civil Procedure. Under Rule 23(c)(2), notice is required to be given to class members only if the class action is certified under Rule 23(b)(3). As this Court knows, Rule 23(b)(3) encompasses separate individual causes of action for damages, which have no cohesiveness and

no nexus other than that they have a common question of law or fact. In such case, people holding separate individual claims for damages have a constitutional right to notice before a final judgment is entered determining their claim. In many instances, they may want to opt-out and prosecute their own individual actions. No such considerations are applicable to the instant case, where the only right of any Plaintiff is the same right applicable to all Plaintiffs, a right to participate proportionately in a recovery by the Common Trust Fund. This is a true class action, with a cohesiveness and unity of interests, not present in cases under Rule 23(b)(3). If the Bank intended to claim that Rule 23 of the Alabama Rules of Civil Procedure was in violation of the Fourteenth Amendment to the United States Constitution, that issue should have been raised in the first instance in the Court Below. This would have required the argument that Rule 23, approved by this Court, was violative of those same Constitutional rights. Petitioner cannot raise for the first time in this Court, the claim that Rule 23 denies constitutional rights.

PROPOSITION III

The Factual Determination As To Whether The Class Should Be Certified Under Rule 23(b)(1)(A), 23(b)(1)(B), Or 23(b)(2) Was Properly Within The Discretion Of The Trial Court And Its Decision Of Disputed Issues Does Not Constitute A Denial Of Constitutional Right Of The Petitioner.

As mandated by Rule 23, the Circuit Court held a hearing and made a factual determination that this class action was properly maintained under Rule 23(b)(1)(A), 23(b)(1)(B), and/or 23(b)(2). The Supreme Court of Alabama affirmed, holding that this was a matter within the discretion of the Trial Court and that a review of the factors considered showed no abuse of discretion. This Court, on certiorari, does not undertake to review the correctness of factual determinations within the discretion of a Trial Court. The Trial Court, in its Order, set out

at length the reasons for its determinations.[18] This Order discloses no constitutional question raised by the Bank and decided adversely by the Circuit Court.

The cases decided under Federal Rules 23(b)(1) and 23(b)(2) make it clear that notice in advance is *not* required under those sections, since they involve true common rights and require uniform treatment by the Courts. See *e.g., Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881 (5th Cir., 1977); *Robinson* v. *Union Carbide Corp.*, 544 F. 2d 1258 (5th Cir., 1977). The Alabama Supreme Court decision was thus squarely in line with the federal decisions.

PROPOSITION IV

The Decision Of The Supreme Court Of Alabama Does Not Conflict With The Decision Of This Court In *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, Or *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156.

Bank argues that the decision of the Supreme Court of Alabama decided a federal constitutional question in a way which conflicts with the decisions of this Court in *Mullane* v. *Central Haover Bank*, 339 U. S. 306, and *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156. While this conclusion is stated, nowhere does Petitioner point out any specific language by the Supreme Court of Alabama which shows such a conflict. The Supreme Court of Alabama stated:

> "The Appellants further contend that the Plaintiffs are seeking primarily money damages and it was error to allow them to proceed under Rule 23(b)(1) and (b)(2) instead of Rule 23(b)(3). We do not agree."

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[18] Petition, Appendix G, pp. A-59 to A-66.

That language certainly does not conflict with the decisions of the Supreme Court in either *Mullane* of *Eisen*. To the contrary, the Supreme Court of Alabama continued:

> "Neither *Eisen* nor *Mullane* dealt with notice under Rule 23(b)(1) or (b)(2). In fact, Rule 23(c) provides that notice is required *only* in class actions certified under Rule 23(b)(3). Rule 23(b)(1) and (b)(2) class actions have been held not to require notice. *Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881 (5th Cir. 1977); *Robinson* v. *Union Carbide Corp.*, 544 F. 2d 1258 (5th Cir. 1977)."[19]

That language certainly does not conflict with any statement by this Court in either *Mullane* or *Eisen*. The Supreme Court of Alabama further held that the decision as to whether the Court should be certified under Rule 23(b)(3) was a matter within the discretion of the Trial Court. That was not a question of Federal constitutional rights, but a question of construction of the Alabama pleadings and the Alabama rules.

As this Court knows, *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, did not involve any class action. The holding of this Court was that a trustee-bank, suing for accounting, could not obtain a final determination of its liability to the beneficiaries without giving notice to the beneficiaries.

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156, involved solely a class action under Rule 23(b)(3). This Court is thoroughly familiar with the facts in that case and the fact that the named Plaintiff sought an adjudification of the rights of some six million individuals with whom he had no connection. There were no common funds and no nexus between the named Plaintiff and the class Plaintiff. In Footnote 14, 417 U.S. 177, this Court made it plain:

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[19] Petition, Appendix A, p. A-14.

> "We are concerned here only with the notice requirements of subdivision (c)(2), which are applicable to class actions maintained under subdivision (b)(3). By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2). Petitioner's effort to qualify his suit as a class action under subdivisions (b)(1) and (b)(2) was rejected by the Court of Appeals."

That language shows that this Court's decision in *Eisen* was inapplicable to the decision of the Supreme Court of Alabama on an entirely different type of class action. Here no Plaintiff had a claim for unliquidated damages. There was no claim for separate individual relief. Any claim of any Plaintiff was limited to a proportional part of the Common Trust Fund recovery. Here, there was complete cohesiveness and unity of claims and complete absence of any disparity, separateness, or conflict among claims. An adjudication of the breach of duty and an order requiring the trustee to restore losses to the Common Fund would affect proportionately every member of the Plaintiff-class, regardless of whether anyone might opt-out of the class action.

We respectfully submit that on this issue Petitioner's position is based squarely upon the factual claim rejected by the Court Below, that this action sought primarily money damages on the separate individual claims of the class Plaintiffs. Neither the facts nor the law support this claim by the Bank.

PROPOSITION V

The Decision Of The Supreme Court Of Alabama Does Not Conflict With The Decision Of The Fifth Circuit Court Of Appeals In *Johnson* v. *General Motors Corporation*, 598 F. 2d 432, 438, Or *Penson* v. *Terminal Transport Company*, 634 F. 2d 989, 994.

Again[20] Petitioner makes the contention that this action sought to adjudicate the rights of class members to money damages. That contention was denied by the Supreme Court of Alabama and is contrary to both the pleadings and the final judgment.

In neither of the two cases cited did the Court of Appeals for the Fifth Circuit hold that a determination of liability of the trustee could not be made until after notice to all class members. Neither *Johnson* v. *General Motors Corp.*, 598 F. 2d 432, 438, or *Penson* v. *Terminal Transport Co.*, 634 F. 2d 989, considered any constitutional right of the Defendant. In *Johnson* v. *General Motors Corp.*, 598 F. 2d 432 (1979, the Court had before it only the constitutional question of whether the individual monetary claims of absent members could be barred without notice to that member that his claim would be adjudicated. In *Penson* v. *Terminal Transport Co.*, 634 F. 2d 989, the Court pointed out the advent of the "hybrid" Rule 23(b)(2) class actions, in which individual monetary relief for class members is sought in addition to class-wide injunctive or declaratory relief. The Court did not state that the Defendant had a constitutional right to require notice to all class members before liability wsa determined, but only that notice was required before the right of individual class members to monetary relief could be adjudcated. Here, there were no separate individual monetary claims for damages to be adjudicated. The only monetary relief sought and the only monetary relief granted was the liability of the Defendant-Bank to the Common Trust Funds of which it was trustee. The only right of any Plaintiff was the right to proportional participation in any recovery for the Common Trust Fund.

Instead of conflicting with the decisions of the Fifth Circuit Court of Appeals, the Supreme Court of Alabama cited in its

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[20] Petition, p. 15.

Opinion the two Opinions of that Court, *Bolton* v. *Murray Envelope Corp.*, 553 F. 2d 881 (5th Cir. 1977) and *Robinson* v. *Union Carbide Corp.*, 544 F. 2d 1258 (5th Cir. 1977). Those decisions fully uphold the decision of the Supreme Court of Alabama that notice is required only where the class is certified under Rule 23(b)(3). *Robinson* further pointed out the reason for preferring certification under Rule 23(b)(1) or 23(b)(2), rather than under Rule 23(b)(3). That "compels inclusion and therefore promotes judicial economy, consistency of result, and binding adjudication more effectively than 23(b)(3)." The reason for this distinction is well pointed out in Moore's Federal Practice, § 23.55, p. 23-442:

> "In these and related situations we suggest that, although some notice to the members may be desirable and may be given as provided in (d)(2), a judgment should be res judicata as to all the class, even in the absence of notice, in the (b)(1) and (b)(2) situations when the requirements of Rule 23 have been satisfied. On the other hand, in the (b)(3) type of class suit, where notice is mandatory, there is no jural relationship between the members. They are legal strangers, related only by some common question of law or fact and with a righ to opt out of the class. The mandatory notice under (c)(2) informs them of that right, and satisfies the presumed due process pre-condition to entering a judgment binding against them."

This Court is properly concerned about the overcrowding of court dockets. Equity has long abhorred a multiplicity of actions. This Court, for the better part of half a century, has concerned itself with a class action procedure which would give due process to all parties and avoid multiplicity of actions. Rule 23, as last amended seventeen years ago, provides such a constitutional procedure. Where there is cohesiveness and unity of interests, and no separate claims to be adjudicated; where an adjudication of the liability of the trustee to the Common Trust Funds will automatically determine all of the issues as to every

beneficiary, there is no constitutional requirement that every individual beneficiary receive notice. Requirement of such notice in Rule 23(b)(1) and 23(b)(2) cases would defeat the very salutary purposes of the class action procedure.

Under this portion of the Petition, Bank claims that the Supreme Court of Alabama permitted a "fluid class action recovery". That is not true. The only recovery permitted was the recovery by the Common Trust Funds from the unfaithful trustee. It then became the trustee's duty to distribute the recovery to the beneficiaries entitled thereto, in accordance with the Common Trust Fund Plan. The proportionate interest of each participating unit and of each participating trust was a matter of simple mathematical calculation. As the Supreme Court of Alabama pointed out in its Opinion, 425 So. 2d 429, HN 22:

> "The evidence shows the names of the beneficiaries of the 1,250 trusts, all of which names are on file in First Alabama's computer. The order of the trial court sets out in detail how this calculation and distribution are to take place."

Unless the Bank is guilty of further breaches of trust, the proper distribution of the recovery in favor of the Common Trust Funds should follow as a matter of course. However, under the Alabama Statute, the Court retains jurisdiction for making such further orders as might be necessary to fully implement its previous order.[21]

PROPOSITION VI

The Decision Of The Supreme Court Of Alabama Does Not Decide A Constitutional Question In Conflict With Decisions Of Other State Courts Of Last Resort.

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[21] Alabama Code of 1975, § 6-6-230. "Further relief based on a declaratory judgment may be granted whenever necessary or proper."

None of the decisions of other State Courts, cited by Petitioner on this point, involves the question of notice to members of a class certified under Rule 23(b)(1) or 23(b)(2). Cetainly none of them purport to uphold the position for which Petitioner contends, that the right of the Court to require the trustee to restore to the Common Funds, losses due to its breach of trust, is conditioned upon someone paying to serve notice upon every individual who will ultimately benefit from that restoration.

Reference is made to the Uniform Class Actions Act, Section 7(d). No such law is in effect in Alabama. The law in Alabama, like the Federal Rules of Civil Procedure, requires notice only where the class is certified under Rule 23(b)(3).

PROPOSITION VII

The Decision Of The Court Below That The Bank Should Be Required To Seek An Accounting Of Its Acts As Trustee Of 1,250 Trusts, In Proceedings Separate From The Class Action, Did Not Deprive Bank Of Any Constitutionally Protected Right.

The statement of fact by the Petitioner that the Court Below denied Bank its well-established right to insist upon an accounting of 1,250 individual trusts, is absolutely untrue and is contradicted by the Order of the Circuit court, appended hereto as Appendix A. That Order specifically reserved to the Bank the right to bring such separate actions for accounting as might be appropriate under the laws. All that was denied to the Bank was a claimed privilege of impeding the orderly disposition of the class action. In a class action under either the Alabama or Federal Rule, the unnamed class members are not parties for the purpose of counterclaim, even if the Bank's capacity had been the same in the primary suit and in the would-be counterclaim. Under the Alabama Rules of Civil Procedure, Rules 13 and 23, it was a matter in the discretion of the Court whether to require

separate proceedings for separate accountings of separate trusts handled by the Bank in a separate legal capacity. The Supreme Court of Alabama correctly held that the Trial Court did not exceed its discretion.

Throughout this case, the Bank has argued that the Court could not determine the prudence of investments by the Common Trust Fund, without considering the separate investment decisions made in the separate trusts which held participating units in the Common Fund. No authority is cited in support of this position. The Circuit Court had no difficulty in determining the prudence of the Common Trust Fund investments. The financial experience of each individual trust had absolutely nothing to do with the issue before the Court, whether the investments made by the trustee of the Common Fund were prudent or imprudent.

PROPOSITION VIII

No Issue Was Raised In The Alabama Court That It Was Unconstitutional To Adjudge The Liability Of A National Bank For Breach Of Duty By Any Standards Other Than Those Applcable To All Paid Trustees.

The Constitution of the United States does not accord to national banks any protection from the same standards of duty and remedies for breach of duty applicable to any other paid trustee.

Petitioner attempts to raise this issue for the first time on Petition For Certiorari. Petitioner cites no constitutional provision and no statutory provision according to a national bank, acting as a paid trustee, any immunity from judicial accountability in any court, state or federal, having jurisdiction over the bank. Having determined that the Bank breached its duty under the prudent man rule, the rule applicable to all paid trustees in Alabama, the decision requiring the Bank to restore the losses due to its breach of duty, is plainly not an impermissible state judicial interference.

PROPOSITION IX

Petition For Certiorari Based Upon Misstatements Of Material Facts Should Be Discouraged And This Case Is A Proper Case For Imposition Of Sanctions Under Rule 49(2) Of This Court.

The Circuit Court of Montgomery County thoroughly considered the facts and determined that the Bank had breached its duty as trustee. It required the trustee to bear this loss, not the innocent beneficiaries. The Supreme Court of Alabama carefully considered all of the contentions made by the Bank and affirmed the decision of the Circuit Court. Now Bank applies for certiorari and seeks to uphold such a Petition by untrue statements of factual situations. We submit that such action is indefensible and should be strongly rebuffed.

Petitioner applied to the Supreme Court of Alabama for an Order staying proceedings pending this Petition For Certiorari. That Order[22] granted the Stay Order specifically conditioned upon filing a Supersedeas Bond, as required by Section 2101(f) of the Judicial Code. The condition of that Bond requires the payment of all damages and costs which the other party may sustain. Under the decision of the Supreme Court of Alabama in *Osborn* v. *Riley,* 331 So. 2d 268, (Ala. 1976), attorneys' fees for resisting such proceedings are damages recoverable by the aggrieved party. Respondents do not want to ask anything in this Court which might prevent them from proper action in Alabama on the Bond given by the Alabama Petitioner to the Alabama Court.

However, we feel very deeply that this Petition falls within the category of cases in which this Court can take proper steps to protect itself against improper petitions. The Petition is not only

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[22] Petition, Appendix C, p. A-33.

groundless, but does not even purport to comply with the Rule 21(h) of this Court. Under Rule 49(2), this Court has the plain right to discourage the filing of such groundless Petitions For Certiorari. We humbly and respectfully suggest to the Court that this is an appropriate case for the imposition of sanctions under Rule 49(2).

CONCLUSION

The Judgment of the Alabama Court, requiring the defaulting trustee to make good the losses to the trusts under its control, did full justice to the trustee and to the beneficiaries. That judgment in no way deprives the Petitioner of any constitutional right and was not in any way in conflict with the Rules of Civil Procedure or the prior decisions of this Court construing such Rules. We, therefore, respectfully submit that the Petition should be promptly denied.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action
Number CV-78-1491-H

Charlotte Kyle Martin and Kathleen Gerson, et al.,
Plaintiffs,

v.

First Alabama Bank of Montgomery, N. A.,
a National Banking Corporation,
Defendant.

Order On Motion To Dismiss

This matter is before the Court on the motion of the plaintiffs to dismiss the counterclaim filed by the defendant First Alabama Bank. The Court having considered the counterclaim and the motion to dismiss, and having heard the presentation of counsel, is of the opinion that the motion to dismiss is due to be granted, without prejudice to the right of the defendant to bring such separate actions for accountings and in such courts as may be appropriate under the laws of the state.

It is therefore,

Considered and ordered that the counterclaim of the defendant First Alabama Bank be in the same hereby is dismissed without prejudice.

Done this 3rd day of June, 1980.

/s/ PERRY O. HOOPER
Circuit Judge

APPENDIX B-1

R-1397:

Now, what is a class action procedure? Because, obviously, that's what is before the Court today. This is a device where a plaintiff says to the Court, I not only want to sue on my behalf, but I want to sue on behalf of a whole lot of other people, and in this particular case where the

R-1398:

(b)(3) claim has been dropped, these plaintiffs are saying to the Court, I not only want to sue on behalf of all the other beneficiaries of all the other 1255 trust, or any part of the corpus of which was invested in any units of the Common Fund at any time from 1971 to the present, but I don't want to give any of these other people any notice; I don't want to give them an opportunity to get out of the case and not be bound by a judgment; I don't want any of those things. We heard, for example, Your Honor, that the Court can now ignore notice because the plaintiffs have decided that they can amend their Complaint and drop a claim that this is a class action under Rule 23(b)(3), and, therefore, not have to give any notice. This isn't correct. The Supreme Court of the United States in *Mulane* v. *Central Hanover Bank* in 339 U.S., which is cited and quoted extensively in the leading *Eisen* v. *Carlisle and Jacquelin* case has held that they can't, involving common trust funds, that notice, and not merely notice by publication, but personal notice to all those who can reasonably be ascertained has to be given. This is a matter of due process under the Constitution of the United States. Now, this is what they are asking this Court to ignore and avoid. Don't give them notice, they say.

APPENDIX B-2

Page 45 (Brief, SC 78-778):

loss; and the Court cited, indeed, *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555.[36]

The other case cited by the court, *Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125 (S.D.N.Y. 1966) involved the question of the conversion rights of debenture holders in one corporation - a situation about as remote from the facts of this case as is conceivable.

Obviously, for example, plaintiff Weldon, with a gain in the Bond Fund, under no circumstances would be entitled to any more from it; and plaintiff Gerson, with a gain in the Equity Fund, would be entitled to nothing from that. Indeed, as has already been shown, the impact of the management of the Bond and Equity Funds on each trust of the named plaintiffs has varied in variables *not related* to the number of participating units.

VII.

Notice is Constitutionally Required

The court below may not, consistently with the due process guaranty of the Constitution of the United States, eliminate notice to the beneficiaries of the more than 1,250 trusts which have invested in the Bond and Equity Funds, and deprive them of an opportunity to opt-out. This is the square

Page 46:

holding of *Mullane* v. *Central Hanover Bank*, 339 U.S. 306. A New York bank, trustee of common funds, under a New York

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[36] 414 F. 2d 315, 316, n. 12.

statute had a right to seek an accounting for its investments in the common funds. The New York statute further provided that a public guardian be appointed in such a proceeding and that the only notice required to beneficiaries of investing trusts was publication in a local newspaper. The Supreme Court invalidated this form of notice and held that individual notice had to be sent to all such beneficiaries whose names and addresses could be ascertained through reasonable effort. Moreover, as the later case of *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156, 173, makes plain, notice to such beneficiaries was not a matter of discretion but was mandated by due process guaranties.

The court below has simply ignored the constitutional requirements specified in *Mullane* more than 25 years ago.

VIII.

The Class Action Order Is Appealable as Final

As demonstrated in the preceding sections of this brief, the class action order is erroneous not only because of errors of factual and legal determination in areas of judicial discretion. This class action order is erroneous as well in such fundamental aspects as denial of a constitutional right to notice and an opportunity to opt-out; as contrary

APPENDIX B-3

Page 75 (Brief, SC 80-853):

Constitution Requires Notice

The court below certified this class action under Rule 23(b)(1) and (2) without notice to the beneficiaries of the more than 1,250 trusts which invested in the bond and equity funds from 1971 through 1978, thus depriving them of an opportunity to opt-out or to be represented by counsel of their choice. This omission below squarely violated the due process guaranties enunciated by the Supreme Court in *Mullane* v. *Central Hanover Bank,* 339 U.S. 306. That case held that a New York bank, in the course of a New York statutory accounting for its investments in common funds, must send individual notice to all beneficiaries of trusts which had invested in participating units of the common funds whose names and addresses could be ascertained through reasonable effort. The Supreme Court there, and in the later case of *Eisen* v. *Carlisle and Jacquelin,* 417 U.S. 156, 173, made it plain that this notice to beneficiaries could not be withdrawn at a trial judge's discretion; it is mandated by due process guaranties.[90]

The need for such constitutional protection is demonstrated graphically in this case by the effect on un-named class members who have subsequently brought actions against the Bank as trustee of their individual trusts.[91] Principles of res judicata,

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[90] Thus the notice requirement cannot be avoided by the attempted legerdemain of transforming a Rule 23(b)(3) case into a 23(b)(1) or (2) case.

[91] See note 16, *supra,*

APPENDIX C

(Page 546, Record 78-775):

C

Prayer For Relief

WHEREFORE, Plaintiffs pray for the following Orders and Judgments:

a. An Order that this action is properly brought as a class action under Rule 23(b)(1) and/or (2), on behalf of all individuals who held beneficial interests in participating units in the Common Trust Fund, known as the "Bond Fund", during the period from 1971 to date.

b. Declaring that the Defendant as paid Trustee was chargeable with the primary duty of maintaining the integrity and safety of the principal of the trust funds in the Common Trust Fund, known as the "Bond Fund".

c. Declaring that the Defendant is liable to account to the said "Bond Fund" for all losses resulting from the making of imprudent, unsafe, speculative, or risky invest-

(Page 547, Record 78-775):

ments and for loss of income thereon.

d. Declaring that the investments, as alleged herein, were imprudent, unsafe, speculative, or risky investments, and surcharging the Defendant for the amount of all losses arising from such imprudent investments.

e. Requiring the Defendant to account to said "Bond Fund" for any losses sustained by reason of the Defendant's act in making such imprudent investments and requiring the Defendant to replace such losses of principal and income into such "Bond Fund".

f. Ascertaining a reasonable attorney's fee and taxing all costs of these proceedings, including a reasonable attorney's fee, against the Defendant.

g. For such other, further, and general relief as to which in equity and in good conscience the Plaintiffs may be entitled.

(Page 551, Record 78-775)

C

Prayer For Relief

WHEREFORE, Plaintiffs pray for the following Orders and Judgments:

a. An Order that this action is properly brought as a class action under Rule 23(b)(1) and/or (2), on behalf of all individuals who held beneficial interests in participating units in the Common Trust Fund, known as the "Equity Fund", during the period from 1971 to date.

b. Declaring that the Defendant as paid Trustee was chargeable with the primary duty of maintaining the integrity and safety of the principal of the trust funds in the Common Trust Fund, known as the "Equity Fund".

c. Declaring that the Defendant is liable to account to the said "Equity Fund" for all losses resulting from the making of imprudent, unsafe, speculative, or risky investments and for loss of income thereon.

d. Declaring that the investments, as alleged

(Page 552, Record 78-775):

herein were imprudent, unsafe, speculative, or risky investments, and surcharging the Defendant for the amount of all losses arising from such imprudent investments.

e. Ascertaining a reasonable attorneys' fee and taxing all costs of these proceedings, including a reasonable attorney's fee, against the Defendant.

f. For such other, further, and general relief as to which in equity and in good conscience the Plaintiffs may be entitled.

APPENDIX D

(Page 1, Record 80-853)

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action
Number CV-78-1491-H

Charlotte Kyle Martin and Kathleen Gerson, et al.,
Plaintiffs,

v.

First Alabama Bank of Montgomery, N.A.,
Defendant.

Counterclaim Of Defendant

1. Defendant (hereafter "Bank") files this counterclaim without waiving any of the separate and several defenses heretofore asserted in its answers of May 24, 1979 and June 19, 1979. Bank insists upon each such defense including, without limiting the generality of the foregoing, the Sixth and Seventh Defenses which assert the relevant Alabama statutes of limitation and laches.

2. Defendant is a national banking association, duly organized and existing as such, and serves as fiduciary in circumstances authorized by the National Banking Act and regulations of the Comptroller of the Currency.

3. Named plaintiffs, Martin, Gerson, Weldon and Parker[1], are named defendants on counterclaim. On July 26, 1979 this

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[1] Hereafter referred to as "Name Plaintiffs' or "Named Defendants on Counterclaim."

Court determined that they are proper representatives of two classes of beneficiaries of trusts of which Bank is trustee—one class comprised of all beneficiaries of trusts any portion of the corpus of which was invested by Bank during the period 1971-1978 in a common trust fund, of which Bank is also trustee, known as the "Bond Fund"; and another class comprised of all beneficiaries of trusts any portion of the corpus of which was invested by Bank during the period 1971-1978 in a common trust fund, of which Bank is also trustee, known as The "Equity Fund."

(Page 2):

This counterclaim is brought against Named Plaintiffs as representatives of the entire classes as heretofore and from time to time determined by this Court. Bank seeks in this counterclaim, among other things, that this Court amend its class action order so as to exclude from the classes all beneficiaries of such trusts any portion of the corpus of which was invested in either of the so-called common funds in cases where there trusts have terminated accompanied by releases in favor of Bank. This counterclaim is brought against all beneficiaries whom or which the Named Plaintiffs represent as class representatives—classes of the extend specified in this Court's order of July 26, 1979, or in any subsequent order.

4. In this action, Named Plaintiffs, and all of the class members whom they represent, have averred that from 1971 through 1978 Bank used substantial portions of the principal of the individual trusts, of which Bank and others were trustees and class members were beneficiaries, to purchase units in one or both of the common funds; that Bank as trustee of the common funds made imprudent investments with the monies and properties in the common funds; and that these investments resulted in substantial losses. Essential to the claims of the class members is proof of demonstrable injury or loss caused by acts

of omissions of Bank which constitute a breach of duty to the class members. Inseparable from this issue is the question of whether Bank, in administering the trusts of which the class members were or are beneficiaries, made impermissible investments which resulted in loss or damage to the class members as beneficiaries of these trusts.

5. Accordingly, Bank brings this counterclaim against the Named Plaintiffs and the class members whom they represent in the exercise of its right to insist at any time—let alone at a time when its investment decisions have been called in question by

(Page 3):

class representatives of the beneficiaries of trusts of which it is or was trustee—that its accounts shall be examined and settled by this Court in order to protect it against further litigation with respect to the matters included in the accountings. The relief here sought in this counterclaim is the established and constitutional right of a trustee to secure, on its own motion, a settlement of its accounts and thus to assure, as of right, repose and the elimination of the burden and expense of multiple litgiation. A denial of this right to which it is entitled would constitute a deprivation of Bank's property without due process of law and a denial of equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States and §§ 6, 13 and 35 of the Constitution of the State of Alabama.

6. In accordance with the established and orderly practice in the State of Alabama, Bank asserts in this counterclaim its entitlement to the judicial accountings which it seeks, namely, a judicial determination of the permissibility of the investments made by Bank as trustee of trusts of which the Named Plaintiffs and all class members were beneficiaries during the period in question in this action. Attached as Exhibit "A" to this counterclaim is a list, by title and file number of Bank, of all such trusts. Attached as Exhibit "B" is a list of all such trusts which have been terminated accompanied by releases.

7.Bank further avers that an identification of all class members and individual notice to each of them whose names and addresses can be ascertained through reasonable effort are requisites of due process of law guaranteed by the Constitutions of the United States and of the State of Alabama. Bank avers, moreover, that such identification and notice are appropriate under the provisions of Rule 23(d)(2) A.R.C.P. for the protection of the members of the class; for the fair conduct of the action, including this counterclaim, so that these class members may be advised of the proposed extent of judgments on the amended complaint and counterclaim; and so that the class members may have

(Page 4):

an opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into or stay out of the action. Bank avers that the expense of such identification and notice is to be borne by the Named Plaintiffs as representatives of the two classes and their members.

8. Bank avers that the accountings which it seeks by this counterclaim and to which it is legally and constitutionally entitled will necessarily involve the expenses and fees of attorneys, accountants, guardians ad litem and other items of expense; and that these fees and expenses must be borne by the Named Plaintiffs and class members.

WHEREFORE, PREMISES CONSIDERED, Bank prays that this Court will order, adjudge and declare that:

1. Bank is entitled to the accountings which it seeks in this counterclaim.

2. Named Plaintiffs and all class members are appropriate defendants on counterclaim.

3. The designation of class members certified in this Court's Order of July 26, 1979, is amended so as to eliminate as class members all beneficiaries whose trust have terminated accompanied by releases in favor of Bank as trustee.

4. This Court will proceed to undertake the judicial accountings sought in this counterclaim.

5. The Named Plaintiffs undertake forthwith the prompt identification of all class members and that they direct and serve individual notice of these proceedings upon all class members whose names and addresses can be ascertained through reasonable effort; and the expense of such identification and notice is to be borne by Named Plaintiffs. This notice should contain as well, pursuant to Rule 23(d)(2) A.R.C.P.—in a form to be approved by this Court—a correct statement of the proposed extent of judgment in this action, including the counterclaim; and shall advise class members of their opportunity to signify whether they consi-

(Page 5):

sider representation by the Named Plaintiffs fair adequate, and to intervene and present claims or defenses, or otherwise to come into or stay out of the action.

6. Guardian or guardians ad litem be appointed to protect their interests of minors, unborn, incapacitated, contigent and uncertain beneficiaries of the aforesaid trusts.

7. The costs of these accountings—including without limitation, the fees of guardians, attorneys, experts, accoutants, and other necessary costs and expenses—are to be borne by the Named Plaintiffs and the class members.

At the conclusion of the accountings herein sought, Bank prays for a judgment releasing and discharging Bank from all liability, including without limitation, liability for investments made in the course of the administration of all of the trusts of

which Named Plaintiffs and the class members were or are beneficiaries from the year 1971 to the closing dates of the accounts therefor.

Bank prays for such further, other and different relief as may be appropriate in the premises.

STEINER, CRUM & BAKER

By /s/ M. R. Nachman, Jr.
M. R. Nachman, Jr.

By /s/ Eric G. Bruggink
Eric Bruggink
Attorneys for Defendant

Certificate Of Service

I hereby certify that I have this day served a copy of the above and foregoing Counterclaim of Defendant upon all counsel of record, by mailing a copy to them, properly addresses, postage prepaid, by United States Mail, on this 13th day of March, 1980.

/s/ M. R. Nachman, Jr.
Of Counsel